No. 84-2036

Office-Supreme Court, U.S.
FILED
JUL 1 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Mahfouz El Shahawy, M.D.,
Petitioner

v.

Sarasota County Public Hospital Board, Sarasota, Florida

On Sworn Petition for Writ of Certiorari Directed to District Court of Appeal Florida Second District in Case No. 84-1738

SWORN PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

MAHFOUZ EL SHAHAWY, M.D.
1851 Arlington Street
Suite 206
Sarasota, Florida 33579
(813) 366-9800
Petitioner Pro Se

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QUESTIONS PRESENTED

I

DID THE STATE APPELLATE COURT ERR BY AFFIRMING PER CURIAM WITHOUT EXPRESS OPINION THE TRIAL COURT'S JUDGMENT IN DISMISSING WITH PREJUDICE SHAHAWY'S COMPLAINT FOR EQUITABLE RELIEF CHALLENGING ADMINISTRATIVE ACTION ON RECORD AND NON-RECORD GROUNDS BECAUSE OF THE PENDENCY OF A LATER-FILED PETITION FOR CERTIORARI REVIEW OF THAT ACTION? DID THE APPELLATE COURT ERR BY DENYING DR. SHAHAWY'S MOTION FOR REHEARING?

II

(BY NECESSARY IMPLICATION) HAS THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT (IN THIS CASE THE STATE COURT OF LAST RESORT) DECIDED THE FEDERAL QUESTION, WHETHER DR. SHAHAWY WAS DENIED HIS RIGHT TO PROCEDURAL DUE PROCESS TO HIS DAY IN COURT UNDER THE FIRST SECTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, ADVERSELY TO PETITIONER HEREIN IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT, OR THE DECISION OF ANOTHER STATE COURT OF LAST RESORT OR THE DECISION OF A FEDERAL COURT OF APPEAL?

III

DID THE STATE APPELLATE COURT OVERLOOK THE FACT THAT THE HOSPITAL ACTED IN AN ARBITRARY, CAPRICIOUS AND DISCRIMINATORY MANNER AGAINST PETITIONER, WHICH PROVIDED SUFFICIENT AND PROPER GROUNDS FOR INJUNCTIVE RELIEF?

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To the Honorable, the Chief Justice and associate Justices of the Supreme Court of the United States:

Mahfouz El Shahawy, M.D., Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of Florida Second District entered in the above-entitled case on February 1, 1985. Motion for Rehearing denied on April 4, 1985. Appendix A (copy of actual order lodged with the Clerk).

OPINIONS BELOW

The "per curiam affirmed" judgment of the District Court of Appeal of Florida Second District whose judgment is herein sought to be reviewed is unreported and is printed in Appendix B (copy of original order lodged with the Clerk).

The journal Entry of judgment of the trial court, the Circuit Court of the Twelfth Judicial Circuit in and for

Sarasota County, Florida, is printed in Appendix C (copy of actual order lodged with the Clerk).

The order of the District Court of Appeal of Florida Second District denying Dr. Shahawy's Motion for Rehearing is printed in Appendix A.

JURISDICTION

The judgment which this Petition seeks to review by certiorari was rendered by the District Court of Appeal Second District and is printed in Appendix B (copy of actual order lodged with the Clerk), and was entered on February 1, 1985. It was a "per curiam affirmed" decision rendered without expressed opinion and affirmed the judgment of the trial court which denied with prejudice because of pending certiorari petition Dr. Shahawy's Motion to Amend Petition for Injunctive Relief, and in fact dismissed his equitable

action with prejudice (Appendix B). A timely Motion for Rehearing was filed on February 15, 1985 and was denied on April 4, 1985 (Appendix 159-164, copy of Motion as lodged with the Clerk) by an order which is printed in Appendix A.

The jurisdiction of the Supreme Court is invoked under and pursuant to 28 USC 1257 (3) by virtue of which final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where any title, right, privilege or immunity is especially set up or claimed under the Constitution of the United States. (Appendix 177). Petitioner herein claims that the State of Florida by the above Florida by the above action has denied him his right to procedural due process, derived from the first section of the Fourteenth Amendment to the United States Constitution,

by denying him his day in court and a hearing in equity on the merits of his case. The District Court of Appeal of Florida Second District was the highest court of Florida in which a decision could be had because "per curiam affirmed" decisions rendered without opinion as of April 1, 1980 are non-reviewable by the Florida Supreme Court because such decisions do not expressly conflict and so confer conflict jurisdiction on the Florida Supreme Court. Nash v. Florida Indus Commission, 88 S Ct 362, 389 US 235, 19 L Ed 2nd conformed to 205 So.2d 700; Dodi Publishing Co. v. Editorial America, S.A. (1980 Fla) 385 So.2d 1369; Robles Del Mar, Inc. v. Indian River Shores (1980 Fla) 385 So.2d 1371; Jollie v. State (1981 Fla) 405 So.2d 418; Gibson v. Avis Rent-A-Car System, Inc. (1980 Fla) 386 So.2d 520, on remand (Fla App D3) 388 So.2d

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Rule 9.030 of the Florida Rules of Appellate Procedure defines the jurisdiction of the Florida Supreme Court and, read in conjunction with the above-cited cases, clearly shows that the District Court of Appeal of Florida Second District was the state court of last resort in this case where no express conflict existed in its "per curiam affirmed" order rendered without express opinion.

QUESTIONS PRESENTED

I

DID THE STATE APPELLATE COURT ERR BY AFFIRMING PER CURIAM WITHOUT EXPRESS OPINION THE TRIAL COURT'S JUDGMENT IN DISMISSING WITH PREJUDICE SHAHAWY'S COMPLAINT FOR EQUITABLE RELIEF CHALLENGING ADMINISTRATIVE ACTION ON RECORD AND NON-RECORD GROUNDS BECAUSE OF THE PENDENCY OF A LATER-FILED PETITION FOR CERTIORARI REVIEW OF THAT ACTION? DID THE APPELLATE COURT ERR BY DENYING DR. SHAHAWY'S MOTION FOR REHEARING?

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STATEMENT OF THE CASE AND FACTS

On October 21, 1983, Dr. Mahfouz El Shahawy ("Shahawy") filed a petition for injunctive and equitable relief in the Sarasota County Circuit Court, seeking to enjoin an October 24, 1983 hearing of the Sarasota County Public Hospital Board ("the Hospital Board"). (App. 5-17, lodged with the Clerk.) That hearing had been scheduled for the dual purposes of considering the denial of Shahawy's medical staff privileges at the Hospital, and the suspension of a particular form of heart catheterization called a "Swan-Ganz" procedure.

At a hearing on Shahawy's petition on October 24, Circuit Judge Silvertooth denied the relief Shahawy had requested. (App. 18-33, lodged with the Clerk.) The sole ground for the court's ruling was that matters raised by Shahawy, as enumerated in his petition, could be argued after the Board hearing was

conducted. Petitioner does not here challenge the pre-Board hearing action by the Circuit Court.

On October 26, the Hospital Board suspended Shahawy's Swan-Ganz privileges and voted not to renew his medical staff privileges. After argument by Shahawy's counsel on rehearing, the Board's actions were reconfirmed on December 12, 1983.

On January 10, 1984, Shahawy timely filed a Petition for Certiorari in the Sarasota County Circuit Court (Case No. 84-115), seeking to preserve his right to a record review of that administrative action. That case was assigned to County Court Judge Parker of Arcadia to sit as a circuit court judge. Shahawy moved to stay the Hospital action pending the court review, but the request for stay was denied. (App. 34-108, lodged with the Clerk.)

After Judge Parker has denied a

stay of the Hospital Board's action because of lack of jurisdiction, Shahawy filed in the earlier injunctive suit a motion to amend his Petition for Equitable Relief. (App. 109-112, lodged with the Clerk.) Shahawy's amended petition sought equitable relief from the Hospital's suspension of his medical privileges, based on enumerated denials of procedural due process guaranteed under state and federal laws and violations of the Hospital's governing by-laws. A hearing on the petition was duly noticed.

At a June 13, 1984 hearing, Circuit Judge Hensley, who had been assigned the hearing, read into the record his denial of Shahawy's petition to amend. (App. 113-124, lodged with the Clerk.) This ruling was formalized by a written final order, signed on June 28, 1984 and filed on July 2, which "denied [Shahawy's motion to amend] with prejudice because

of pending certiorari proceeding."[1] (App. 3, lodged with the Clerk.)

On August 27, 1984, Petitioner himself apppealed the above order. (App. 128-151, lodged with the Clerk.)

Shahawy has deliberately omitted from this statement (i) any reference to other proceedings between these parties, (ii) factual details regarding the merits of the Hospital's termination of Shahawy's medical staff privileges, and (iii) iteration of the details of the dueprocess and by-law violations which surrounded the Hospital's action in terminating his staff privileges. While these would provide interesting "color" for the court and of course are presumed

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[1] The court can judicially notice that the then-pending certiorari proceeding has been voluntarily dismissed on July 5, 1984. Section 90.202(6), Florida Statutes (1983) (App. 125-127, lodged with the Clerk.)

be true for purposes of the court's dismissal with prejudice, they are wholly irrelevant to the issue in this Petition for Writ of Certiorari. That issue is Shahawy's right to maintain an equitable action challenging the administrative action, on record and non-record grounds, during the pendency of a later-filed and already voluntarily dismissed on-the-record certiorari review of the administrative action by the county court. Any attempt to color this petition to the United States Supreme Court for a writ of certiorari with other details or matters could have no purpose but to detract from a determination of this narrow legal issue of denial of Petitioner's due process right to his day in court in equity under Section One of the Constitution of the United States.

Circuit Judge Hensley's order filed on July 2, 1984 "denied [Shahawy's motion

to amend] with prejudice because of pending certiorari proceedings." (App. C.) That order is the root cause of this Petition for Writ of Certiorari. It supplied a new and unexpected basis of claim by Dr. Shahawy of denial of his due process right under the Fourteenth Amendment to the Constitution of the United States to his day in court in equity. That order constituted fundamental error, under the law of Florida, going to the merits of the action because Dr. Shahawy's fundamental right to a day in equity and a trial on the merits was denied him. Sanford v. Rubin infra; American Surety Co. v. Coblentz infra, Vol 3 Fla Jur 2nd page 364; Gibson v. State infra.

Under the law of Florida such fundamental error in civil actions is non-waivable and may be raised at any time on appeal. 3 Fla Jur 2nd page 362;

Cowart v. West Palm Beach infra; Black v. State infra; Ross v. Florida Sun Life Ins. Co. infra.

The issue of denial of Dr. Shahawy's due process right to his day in court in equity by virtue of the Fourteenth Amendment to the Constitution of the United States was brought to the attention of the Appeal Court by Petitioner's attorney, Arthur England, Jr., former Chief Justice of the Florida Supreme Court, in his Initial Brief on Appeal (App. 137-140, lodged with the Clerk) and that issue was also brought to that Appeal Court's attention by Motion for Rehearing. See paragraph four of the Motion for Rehearing (App. 161, lodged with the Clerk) which reads as follows:

> "The trial court's order denying with prejudice Appellant's Motion to Amend Petition for Injunctive Relief in fact dismissed his action with prejudice. Therefore appellant is denied his right to due process guaranteed by the Constitutions of Florida and the United States of America."

The response to the Motion for Rehearing was not only unresponsive but untimely. (App. 4, original copy to Clerk's office; App. 165-168.) Yet the trial judge's order was affirmed per curiam without opinion by the District Court of Appeal of Florida's Second District and Dr. Shahawy's Motion for Rehearing was denied. (App. A, lodged with the Clerk.

ARGUMENT

In affirming the trial court's order denying Dr. Shahawy his day in court in equity, the District Court of Florida Second District must by necessary implication have based its decision on the Federal due process issue raised because the state-law ground of decision is not adequate to support the judgment of the trial court as affirmed by the Appeal Court, as expounded more fully later in this Petition in the Reasons for Granting Writ portion.

Florida follows the substantial competent evidence rule under which the reviewing court does not weight the evidence where administrative act is reviewed by certiorari itself record bound. By way of illustration a contrario in equity the Court may determine whether administrative action shocks the conscience where it is contrary to the overwhelming weight of the evidence on the record, further the court in equity is not record bound. In Florida, physicians wronged by administrative action have the right to maintain both a certiorari action challenging administrative action denying them privileges and an equity action in order that they may be afforded full justice. Sunshores Inc. v. County of Pinellas, 351 So.2d 758 (Fla 2nd DCA 1977); Margolin v. Morton F. Plant Hospital Ass'n Inc., 348 So.2d 57 (Fla 2d DCA 1977); Carida v. Holy Cross Hospital,

Inc., 472 So.2d 803 (Fla 4th DCA 1983); Palm Beach Martin County Medical Center, Inc. v. Panaro, 431 So.2d 1023 (Fla 4th DCA 1983).

REASONS FOR GRANTING WRIT

Certiorari is a process for the review of administrative action which evaluates only the record of the proceeding below. DeGroot v. Sheffield, 95 So.2d 912(Fla. 1957); Town of Indialantic v. Nance, 400 So.2d 37, 40 (Fla. 5th DCA 1981). Errors outside the record, including any denial of constitutional rights which are not "of record," obviously could not have been reviewed in a certiorari proceeding before the county court.

Hence, Shahawy instituted an equitable action in advance of the Hospital Board's scheduled meeting precisely because he knew of the then-existing, pre-hearing, non-record by-law violations

and due process deprivations by that Board. He also anticipated the outcome of that hearing:

> We would like this court to preserve the status quo and not let them go forth at four p.m. and terminate his privileges because, personally, I think it is a foregone conclusion they have made up their minds. They have already decided they will terminate him. (App. 22, lodged with the Clerk.)

Shahawy's request for injunctive relief, filed even before the administrative action which resulted in the termination of his medical staff privileges, obviously launched a viable civil action well before the post-hearing proceeding which was held to be a bar to prosecution of the equitable suit. Denial of Shahawy's request for emergency, pre-hearing relief obviously did not terminate that injunctive action, and the trial judge at that time expressly so ruled:

> Gentlemen, I think you will all have to make those arguments

after you find out what occurs.[2] (App. 32, lodged with the Clerk.)

The predicted occurred, and the Hospital Board in fact terminated Shahawy's medical staff and Swan-Ganz privileges at the conclusion of its administrative hearing. Shahawy then sought to obtain a court determination of the illegitimacy of the Board action in his pending equitable action, consistent with Judge Silvertooth's earlier pronouncement that Shahawy could raise these issues after the Board hearing was held. Due process denials were raised, as they had been earlier, which would not appear on the

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[2]Counsel for the Hospital Board had advised the trial court that another pending certiorari proceeding, from an earlier and less drastic action taken by the Hospital against Shahawy, had no relevance at all to the injunctive action. (App. 24-25, lodged with the Clerk.) Duplication of actions, or judicial resources, consequently, cannot now be asserted for the trial court's prehearing actions. The lack of time alone, not an abuse of judicial resources, led the Trial court to postpone preliminary relief in the injunctive lawsuit.

record of the Board hearing and which, of course, would never appear of record in a certiorari review of that administrative action before the county judge.

Shahawy's attempt to obtain his day in court on all issues was frustrated by the trial court's erroneous dismissal with prejudice. The justification provided by Hospital counsel and adopted by the judge was that Shahawy had endeavored to protect his only direct appellate rights, however limited, merely by filing (and not seeking to prosecute) a record-bound certiorari review proceeding assigned to the county judge.

The trial court's refusal to permit Shahawy to maintain, not newly commence, a pre-existing action for equitable and declaratory relief against the Hospital Board, in order to develop the record and non-record violations of Shahawy's constitutional and by-law guaranteed rights

constitutes error, where the sole reason for the trial court's denial was the pendency of a record-bound certiorari review of the Hospital's administrative action against Shahawy before a county judge.

1. The existence of a rule providing for review by certiorari does not preclude appellant from proceeding in a separate action in equity.

The trial judge dismissed Shahawy's amended petition for injunctive and declaratory relief upon the erroneous assumption that the then-pending certiorari proceeding precluded the pursuance of such equitable relief. Florida law is clearly to the contrary. In Sunshores, Inc. v. County of Pinellas, 351 So.2d 758 (Fla. 2d DCA 1977) the trial court dismissed with prejudice plaintiff's complaint for equitable relief on the ground that the appellate rules provided the remedy of review by certiorari. The same

appellate court Second District reversed, stating that the plaintiff should not be deprived of its right to pursue equitable relief:

> Although Fla. App. Rule 4.1[3] provides for appellate review by certiorari appellants are not thereby precluded from proceeding with the separate action in equity for equitable estoppel, declaratory relief or injunction.

See also, Sundstrom v. Collier County, 385So.2d 1158 (Fla. 2d DCA 1980). The mere existence of another remedy will not preclude a judgment for declaratory relief. Maciejewski v. Holland, 441 So.2d 703 (Fla. 2d DCA 1983).

The preservation of a litigant's right to equitable relief, notwithstanding the availability of certiorari review, is constitutionally mandated in order to preserve a litigant's right of

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[3] Rule 4.1 was the forerunner of current Rule 9.110.

of access to the courts. Article I, Section 21, Fla. Const. Certiorari by its very definition is a narrow, record-bound review. Constitutional issues cannot be raised and determined in an administrative proceeding. Department of Revenue v. Amrep Corp., 358 So.2d 1343 (Fla. 1978); Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So.2d 695 (Fla. 1978). Since not raised in the administrative forum, they cannot be reviewed in a certiorari review by the county judge.

By limiting Shahawy to certiorari review before the county judge, the trial court denied him the opportunity to raise his non-record, due process claims. Those claims here involve Shahawy's most basic, recognized, and important constitutional right: the right of a professional to earn a livelihood. Meyer v. State of Nebraska, 262 U.S. 390, 399

(1923); Cameron v. Int'l. Alliance of Theatrical Stage Employees and Moving Picture Operators, 176 A. 692 (N.J. App. 1935).

Florida law clearly establishes that the mere availability of certiorari review from administrative agency action cannot be interpreted to preclude a claimant's access to court to raise basic, fundamental due process issues. The trial court's dismissal of Shahawy's complaint, as affirmed by the appellate court, was clearly erroneous and must be reversed.

2. The right of a doctor to assert an equitable claim when wrongfully discharged by a hospital is indisputable.

Sarasota County Memorial Hospital is not the first medical institution in Florida, or indeed in the Second District, to attempt to disregard its by-laws and ignore due process in an effort to

terminate one of its doctor's staff privileges. Where trial courts have approved such actions by dismissing the doctors' complaints with prejudice, the Second District Court of Appeal of Florida and other appellate courts have been swift to pronounce such dismissals error, and to order the plaintiffs' complaints reinstated. Margolin v. Morton F. Plant Hospital Ass'n., Inc., 348 So.2d 57 (Fla. 2d DCA 1977); Carida v. Holy Cross Hospital, Inc., 427 So.2d 803 (Fla. 4th DCA 1983). The decisions in those cases govern this petition for certiorari by the United States Supreme Court. The right of a doctor to assert a claim in equity for injunctive and declaratory relief when wrongfully discharged from staff by a hospital is absolute. Margolin, supra; see also, Palm Beach Martin County Medical Center, Inc. v. Panaro, 431 So.2d 1023 (Fla. 4th DCA 1983).

For purposes of a motion to dismiss, all material allegations of a complaint or petition are taken as true. E.g., Maciejewski v. Holland supra. Since there was no suggestion in the trial court that the amended complaint was in any way deficient as a matter of law, under the Margolin decision, Shahawy's petition and amended petition must be deemed to have pled a viable cause of action for injunctive and declaratory relief. Plainly, it was error for the trial court to dismiss the amended complaint with prejudice, and error for the appellate court to affirm that decision. Moresca v. Allstate Insurance Co., (1970, Fla App D4) 231 So.2d 283.

3. The grounds upon which the trial court dismissed Shahawy's complaint were clearly erroneous.

It is irrelevant to consider why the trial court went astray in dismissing Shahawy's complaint with prejudice. The

answer lies in the brief transcript of the June 13, 1984 hearing, where counsel for the Hospital Board argued that the pending certiorari proceeding before the county judge provided reason enough for the trial judge to terminate Shahawy's equitable circuit court action. (App. 173-124,lodged with the Clerk.)

That argument, which fell before a different judge than the one who had heard the pre-ouster request for an emergency injunction and had left the door open for a post-ouster challenge, asserted three justifications for that action: (a) "what's being wronged here is the judicial process"; (b) if amendment were allowed "there would be a second case exactly duplicating [the certiorari proceeding]; and (c) the certiorari proceeding would be "res judicata as to all issues that [Shahawy is] trying to raise in this case." Counsel plainly led the

trial court into error, for none of these grounds is sufficient, as a matter of law, for the dismissal of Shahawy's complaint with prejudice. (App. 116-118, lodged with the Clerk.)

(a) Wronged judicial process. The mere filing of a review petition which preserves common law appellate rights obviously is not an abuse of the judicial process. Shahawy did no more. In fact, he attempted to conserve judicial resources by staying the Hospital order until the case has been resolved on its merit. The Hospital Board opposed and frustrated that effort. Thus, the Hospital Board, not Shahawy, created the very potential of excessive judicial activity of which it later complained to the trial judge.

(b) Exact duplication of proceedings. A record-only review, such as certiorari, is plainly not a duplication

(let alone an exact duplication) of an action which seeks declaratory and equitable relief from record and non-record denials of due process and violations of the Hospital's governing by-laws. Shahawy made no attempt to litigate both matters and thereby waste the judicial resources. Indeed, after he timely filed his petition for certiorari in order to preserve at least the right to a record review, he moved to stay the Hospital ruling until the case has been resolved on its merit. Since the already-pending equitable proceeding would encompass both the record and non-record violations of Shahawy's rights, the proper and logical course would have been to hold the later, less-inclusive certiorari proceeding. Shahawy's attorney proposed that prudent and conservative route, and decided to proceed only with the injunction proceeding. The Hospital Board would not allow matters to proceed,

however, and successfully opposed that before the circuit judge. (App. 113-124, lodged with the Clerk.)

(c) Res judicata as to all issues. For the reasons that certiorari review would in no event duplicate trial of an action for equitable relief, "all" issues would not be involved, let alone adjudicated in the certiorari and equitable proceedings. Some issues, of course, might overlap, to the extent they relate to matters of record. To that extent there could conceivably be some res judicata effect. But there could not have been, as counsel suggested, an identity of issues which would produce total res judicata effect. At the time of appellate court review there could be no res judicata effect on any issues, for the certiorari proceeding has been voluntarily dismissed. (App. 125-127, lodged with the Clerk.)

4. The trial judge erred in abating Shahawy's initial equitable action by dismissing that action with prejudice because a subsequently-filed petition for certiorari was pending.

By dismissing Shahawy's equitable proceeding because of the pending certiorari proceeding, the trial court's action may be viewed as abating, rather than terminating, Shahawy's equitable proceeding. Res judicata was improperly raised by the Board counsel as a defense to bar a collateral proceeding.

The Florida courts have held that an initial action may never be abated in favor of another action which was subsequently commenced. Burns v. Archer, 352 So.2d 121, 122 (Fla. 2d DCA 1977). In Archer, the appellant filed an equitable action for injunctive relief in circuit court. Subsequently, the appellees filed a separate action in which the appellant became a party defendant by operation of

statute. The appellees then filed a motion in the initial proceeding requesting that the two actions be consolidated, and that the appellant's initial action be abated. The trial court granted this motion. Ironically enough, the Second District Court of Appeal reversed, holding among other things than an initial action may never be abated in favor of a later-filed proceeding. Archer, 352 So.2d at 122.

The courts have consisently followed the abatement rule announced by the Florida Supreme Court in State ex rel. Dos Amigos, Inc. v. Lehman, 131 So. 533 (1930). Moreover, abatement is only appropriate if the subsequent suit is brought "in the same court or other court of like jurisdiction if the parties are the same and both suits are predicated on the same cause of action." Lehman, 131 So. at 535; and see, Bartlett v. Bennett,

360 So.2d 1144, 1145 (Fla. 2d DCA 1978).

The suits in these proceedings were not predicated on the same cause of action. See Horter v. Commercial Bank & Trust Co., 126 So. 909 (1930). Nor is the requirement met that both actions must be brought in courts of similar jurisdiction. Shahawy's initial proceeding was an original, equitable action in circuit court for injunctive and declaratory relief. Shahawy's subsequent proceeding, although also necessarily filed in circuit court, invoked that court's appellate jurisdiction to review administrative proceedings. The two proceedings cannot be equated.

> It is clear the certiorari is in the nature of an appellate process. It is a method of obtaining review, as contrasted to a collateral assault. DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957)

The state appellate court overlooked the fact that the Hospital acted in an

arbitrary, capricious and discriminatory manner against Petitioner, which provided sufficient and proper grounds for injunctive relief on the Motion for Rehearing filed on February 15, 1985. (App. 159-164, lodged with the Clerk.) Appellant pointed in detail to this fact!

Specifically: Material facts were misrepresented to the District Court and lower court surrounding a motion heard in the certiorari proceeding on April 4, 1984 (App. 34-108). The true facts, however, will manifest themselves upon reading the transcript of the motion heard on April 4, 1984. (App. 34-108, lodged with the Clerk). This was transcribed on February 13, 1985. It might also be of interest to the Court to note that appellant's counsel at that hearing was Mr. William Hereford, who was a previous Hospital Board member and participated as a member of that Board on previous review

of Dr. Shahawy's privileges:

A. "Especially if you're talking about the 1980 proceeding, because I was one of them. But I think that the point is, Your Honor, that he's had a singular lack of success in motivating this Board over a long period of years now to give him the slightest break whatsoever..." (App. 89, lodged with the Clerk.)

B. "And we maintain that the Board is, because of all this bitterness and all of this fighting, not a qualified Board or tribunal..." (App. 89.)

C. "The record in this case is replete with appeals to appoint objective -- a special master, objective bodies..." (App. 93.)

D. "May be compelled by mandamus to observe it and observe procedures..."(App. 94.)

E. "It should be further pointed out that injunctive relief is available to preserve the status quo." -- That's what this is all about. We want to preserve the status quo pending the outcome of the hearing on the merits of this case. -- "And injunctive relief is available to preserve the status quo..." (App. 95.)

F. "But the feeling that I have in reviewing the record and knowing everything that's transpired over the last four years,

I honestly believe that impartiality on the part of a lay board, even though they're experienced now and acting in a quasi-judicial manner, I believe it's impossible for them to act impartially. It's hard enough for lawyers and judges to act impartially. I know that because I had to struggle sometimes when I was a judge, trying to act impartially. But for lay people to do it, who don't realize and don't -- maybe they don't care that much about the significance of impartiality, I just feel that there was no way that he would have an even chance with that Board..." (App. 106.)

G. "But this is a Hospital Board that is not trained in the law and for one reason or another has never exhibited one iota of objectivity as far as Dr. Shahawy is concerned..." (App. 97.)

H. "The record is replete with negativeness on the part of the Hospital Board and I don't think under stretch of anyone's imagination could Dr. Shahawy expect any relief from that Hospital Board..." (App. 97.)

I. "They didn't have to take his basic privileges away, too. <u>That's an act of retaliation and I think you have to recognize that</u>. [Emphasis added.] Replete in this record are challenges to the Board and they even made a request and there's a proffer of the questions that would be asked to voir dire the

> Board to determine their impartiality, and that was all denied. That Board was ready to go. It was like a lynch mob. In fact, there were two members of the Board that weren't there for the entire presentation of the evidence. One of them didn't vote following the first hearing in October, but then she voted to affirm, claiming that she read the record and that she affirmed. She should have disqualified herself, but she didn't, she voted to affirm..." (App. 107.)

Also, newly discovered evidence of discrimination against Petitioner by the Sarasota County Public Hospital Board further provides sufficient grounds for the injunctive relief sought which was improperly dismissed. During the regular Hospital Board meeting on February 11, 1985, the Hospital Board authorized a physician, William Crick, to practice in the Catheterization Lab for one and one-half years without any certification by the Board of Cardiovascular Diseases. He continued to enjoy these privileges even after having failed his examination.

(App. 163, 166-167, lodged with the Clerk.) The Petitioner was not permitted to perform the same procedure with qualifications exceeding those required from any member currently in the Catheterization Lab. (App. 169-176, lodged with the Clerk.) This is clearly arbitrary and capricious action by the Hospital Board, for which injunctive relief is appropriate. (App. 163, 166-167, lodged with the Clerk.)

For the above reasons Petitioner's right to his day in court in equity was absolute.

Circuit Judge Hensley by an order filed on July 2, 1984 denied Shahawy's Motion to Amend Petition for Injunctive Relief with prejudice and in fact dismissed Shahawy's action with prejudice (App. 121, lodged with the Clerk.)

That order of Judge Hensley contained his state-law ground of decision

in haec verba "Ordered and Adjudged that the said Motion be and the same is hereby denied with prejudice because of pending certiorari proceeding." That order is the root cause of this petition for certiorari. It supplied a new and unexpected basis of claim for Shahawy of denial of his due process right to his day in court in equity by virtue of Section One of the Fourteenth Amendment to the Constitution of the United States. That order constituted fundamental error, under the laws of Florida, going to the merits of the action because Dr. Shahawy's fundamental right to a day in court in equity and a trial on the merits was denied him. 3 Fla Jr 2d page 364. Gibson v. State, (1977, Fla) 351 So.2d 948; Sanford v. Rubin (1970, Fla) 237 So.2d 134, conformed to (Fla App D3) 239 So.2d 49; American Surety Co. v. Coblentz (1967) 381 F2d 185, later app (CA5 Fla) 416 F2d 1059.

Under the law of Florida such fundamental error in civil actions is non-waivable and may be raised at any time. 3 Fla Jur 2d page 362. Cowart v. West Palm Beach (1971, Fla) 255 So.2d 673; Black v. State (1965, Fla App D2) 173 So.2d 166; Ross v. Florida Sun Life Ins. Co. (1960, Fla App D2) 124 So.2d 892.

In his Initial Brief on appeal Shahawy's attorney, Arthur England, Jr., former Chief Justice of the Florida Supreme Court, raised the issue that by limiting Shahawy to certiorari review, the trial court denied him the opportunity to raise his non-record, due process claims in equity involving Shahawy's most basic, recognized, and important constitutional right, the right of a professional to earn a living, and cited Meyer v. State of Nebraska, 262 U.S. 390, 399 (1923) in support of that position, (printed in App. 140, lodged

with the Clerk) and the issue of denial of Dr. Shahawy's right to due process to his day in court in equity under the Fourteenth Amendment to the Constitution of the United States was also raised by Motion for Rehearing on Appeal clearly and in timely fashion to bring the federal due process issue fairly to the Court's attention in paragraph four thereof. (App. 161, lodged with the Clerk.) Giles v. Teasley (1904) 193 US 146, 48 L Ed 655, 24 S Ct 359; 2 Fed Procedure L Ed page 310; Bridge Proprietors v. Hoboken Co.(1864) 68 US 116, 17 L Ed 571; Spencer v. Merchant (1888) 125 US 345, 31 L Ed 763, 8 S Ct 921; Furman v. Nichol (1869) 76 US 44, 19 L Ed 370; Copperweld Steel Co. v. Industrial Com.of Ohio (1945) 324 US 780, 89 L Ed 1363, 65 S Ct 1006.

The District Court of Florida Second District then per curiam affirmed the

trial court's decision and denied Shahawy's Motion for Rehearing. An independent state ground of decision bars further review in the Supreme Court but if a state-law ground of decision does not appear adequate to support the judgment, the Supreme Court will take jurisdiction. 2 Fed Proc, L Ed page 322. Abie State Bank v. Bryan (1931) 383 US 765, 75 L Ed 690, 51 S Ct 252; Williams v. Kaiser (1945) 323 US 471, 89 L Ed 398, 65 S Ct 363; Durley v. Mayo (1956) 351 US 277, 100 L Ed 1178, 76 S Ct 806 reh den 352 US 859, 1 L Ed 2d 69, 77 S Ct 22.

On the assumption that if the decision cannot be supported on state grounds, the state court must have based its decision on its view of federal issues.Williams v. Kaiser (1945) 323 US 471, 89 L Ed 398, 65 S Ct 363; Durley v. Mayo (1956) 351 US 277, 100 L Ed 1178, 76 S Ct 806, reh den 352 US 895, 1 L Ed 2d

69, 77 S Ct 22. 2 Fed Proc L Ed page 322.

In order to be an adequate ground of decision, a non-federal ground must have fair and substantial support, since a federal right cannot be denied on insubstantial grounds. Lawrence v. State Tax Com. (1932) 286 US 276, 76 L Ed 1102, 52 S Ct 556, 87 ALR 374; Demorest v. City Bank Farmers Trust Co. (1944) 321 US 36, 88 L Ed 526, 64 S Ct 384; Staub v. Baxley (1958) 355 US 313, 2 L Ed 302, 78 S Ct 277; NAACP v. Alabama (1958) 357 US 449, 2 L Ed 2d 1488, 78 S Ct 1163; Wolfe v. North Carolina (1960) 364 US 177, 4 L Ed 2d 1650, 80 S Ct 1482, reh den 364 US 856,5 L Ed 2d 80, 81 S Ct 29. 2 Fed Proc L Ed page 322.

Therefore, a state ground must be supported by prior state practice (2 Fed Proc L Ed page 322; Staub v. Baxley (1958) 355 US 313, 2 L Ed 302, 78 S Ct 277) and not be inconsistent with prior

determinations of the state's highest court. Young v. Ragen (1949) 337 US 235, 93 L Ed 1333, 69 S Ct 1037. 2 Fed Proc L Ed 322.

The state law ground of decision was that Dr. Shahawy's motion to amend his petition for injunctive relief was denied with prejudice, and in fact dismissed his action, because of "pending certiorari proceeding." It was not adequate to support that decision because among other things that state ground does not have a fair and substantial support and therefore constitutes insubstantial grounds. Lawrence v. State Tax Com. supra; Demorest v. City Bank Farmers Trust Co. supra; Staub v. Baxley supra; Wolfe v. North Carolina supra.

The Appellate Court must have based its decision on its view of the federal issue presented by Dr. Shahawy of the denial of his federal due process right to

his day in court, under the Fourteenth Amendment to the United States Constitution, by the trial judge. Abie State Bank v. Bryan supra; Williams v. Kaiser, supra; Durley v. Mayo supra. 2 Fed Proc L Ed page 322.

That decision was adverse to Dr. Shahawy and in conflict with the applicable decision of a federal court of appeals in Aetna State Bank v. Altheimer C.A. Ill 1970 430 F.2nd 750, and in conflict with other decisions of other state courts of last resort. Aberdeen Restaurant Corp. v. Gottfried, 285 N.Y.S. 835 (Sup Ct), and in conflict with other applicable decisions of the U. S. Supreme Court. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S Ct 172, 65 L Ed 349; 16 ALR 196; 16A Am Jur page 968, 969. Snyder v. Massachusetts, 291 US 97, 78 L Ed 674, 54 S Ct 330, 90 ALR (ovrld on other grounds Malloy v. Hogan, 378 US 1,

12 L Ed 2d 653, 84 S Ct 1489) and (disapproved on other grounds Duncan v. Louisiana, 391 US 145, 20 L Ed 2d 491, 88 S Ct 1444, 45 Ohio Ops 2d 198, reh den 392 US 947, 20 L Ed 2d 1412 88 S Ct 2270); Powell v. Alabama, 287 US 45 L Ed 158, 53 S Ct 55, 84 ALR 527; Blackmer v. United States, 284 US 421, 761 L Ed 375, 52 S Ct 252; Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 US 151, 76 L Ed 214, 52 S Ct 69; Brinkerhoff-Faris Trust & Savco v. Hill, 281 US 673, 74 L Ed 1107, 50 S Ct 451.

Abatement as used in Statute 28 USC 2105 in Bowles v. Wilke, 175 F.2nd 35, 37 (7th Cir 1949) was defined as being the overthrow of an action which defeats the action for the present but does not debar the plaintiff from commencing it in a better way. In this instant case the trial court's order denying with prejudice Dr. Shahawy's Motion to Amend Petition for Injunctive Relief as affirmed

and adopted by the Florida Appellate Court in fact dismissed his action with prejudice. Notwithstanding 28 USC 2105 in Aetna State Bank v. Altheimer supra, the federal court reversed an order because that order was repugnant to Motion to Abate the action because it dismissed the action instead of staying it. This court clearly may reverse the Florida court's error in this case because its error clearly does not fall within the fair meaning of error immune from reversal under the terms of 28 USC 2105 because like Aetna supra the Florida courts dismissed Dr. Shahawy'a action with prejudice and did not temporarily abate it, and clearly was error. Aetna State Bank v. Altheimer supra; Moresca v. Allstate Insurance Co. supra.

Therefore under Rule 17 (b)(c) of this Court stating considerations governing review on certiorari this Court

should in this case exercise its power of supervision where the District Court of Appeal of Florida Second District has sanctioned such aforementioned departure by the trial court from the accepted and usual course of judicial conduct; and should grant review by certiorari in exercise of its conflict jurisdiction.

CONCLUSION

There has been no due process in this case. There has been no valid reason for breaching the contract -- i.e. medical staff by-laws -- and not renewing Dr. Shahawy's privileges at Sarasota Memorial Hospital after he had served well for over eight years. The Hospital Board has violated every possible provision of the by-laws and has trampled Dr. Shahawy's right to due process. The Board's decisions, and the methods by which it reached those decisions, depart from the essential requirements of law. The Hospital Board is mired in the petty politics among some members of its medical staff and has tried to destroy Dr. Shahawy's livelihood.

Sarasota Memorial Hospital has the only cardiac catheterization laboratory and the only cardiac surgery in town. The Board has denied those facilities to Dr. Shahawy's patients and deprived the

other taxpaying citizens of Petitioner's unequalled expertise. Dr. Shahawy would respectfully submit that his credentials and qualifications far exceed those required from any physician currently practicing at Sarasota Memorial Hospital. The Hospital Board has acted in an arbitrary, capricious and discriminatory manner. Such abuse of power should not be sanctioned.

Dr. Shahawy's medical staff privileges at Sarasota Memorial Hospital have been unlawfully terminated. He has endeavored to assert the impropriety of that action. He has never had his day in court. The trial and appellate courts' action which has denied him access to Florida's courts violates Article 1, Section 21 of the Florida Constitution and due process granted to him under the Fourteenth Amendment to the U. S. Constitution.

For the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

STATE OF FLORIDA
COUNTY OF SARASOTA

SWORN AND SUBSCRIBED TO ME THIS 19th DAY OF JUNE, 1985, AND BEFORE ME PERSONALLY APPEARED MAHFOUZ EL SHAHAWY, M.D. TO ME WELL KNOWN AND KNOWN TO ME TO BE THE PERSON WHO EXECUTED THIS DOCUMENT.

NOTARY PUBLIC Beryl E. Adam

My Commission Expires:
2/13/86

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petition was furnished by mail to Charles Johnson, Chairman, Sarasota County Public Hospital Board, Sarasota Memorial Hospital, 1901 Arlington Street, Sarasota, Florida 33579, this 28th day of June, 1985.

M. EL SHAHAWY, M.D.

Mailed Certified to Supreme Court of the United States of America, Washington, D. C., on June 28th, 1985.

STATE OF FLORIDA
COUNTY OF SARASOTA

SWORN AND SUBSCRIBED TO ME THIS 19th DAY OF JUNE, 1985, AND BEFORE ME PERSONALLY APPEARED MAHFOUZ EL SHAHAWY, M.D., TO ME WELL KNOWN AND KNOWN TO ME TO BE THE PERSON WHO EXECUTED THIS DOCUMENT.

NOTARY PUBLIC

My Commission Expires: 2/13/86

Beryl E. Adams

APPENDIX A

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

April 4, 1985

MAHFOUZ EL SHAHAWY, M.D., Appellant,	)	
v.	)	CASE NO.
SARASOTA COUNTY PUBLIC HOSPITAL BOARD, Appellee.	)	84-1738

Counsel for appellant having filed a motion for rehearing in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

A TRUE COPY
ATTEST:

WILLIAM A. HADDAD
CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

c: Walter G. Campbell, Jr., Esquire
A. Lamar Matthews, Jr., Esquire

APPENDIX B

NOT FINAL UNTIL TIME EXPERIES TO
FILE REHEARING MOTION AND
IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

MAHFOUZ EL SHAHAWY, M.D.,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO.
	)	84-1738
SARASOTA COUNTY PUBLIC	)	
HOSPITAL BOARD,	)	
	)	
Appellee.	)	
	)	

Opinion filed February 1, 1985.

Appeal from the Circuit Court for Sarasota County: Robert E. Hensley, Judge.

Arthur J. England, Jr., of Fine, Jacobson, Schwartz, Nash, Block & England, Miami, for Appellant.

A. Lamar Matthews, Jr., Frazer F. Hilder and Theodore C. Eastmoore of Williams, Parker, Harrison, Dietz & Getzen, Sarasota, for Appellee.

PER CURIAM.

Affirmed.

GRIMES, A.C.J., and DANAHY and FRANK, JJ.,Concur.

APPENDIX C

TWELFTH JUDICAL CIRCUIT,
IN AND FOR SARASOTA COUNTY,
FLORIDA

CASE NO. 83-3774-CA-01

MAHFOUZ EL SHAHAWY, M.D.,

Petitioner,

v.

SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Respondent.

ORDER ON PLAINTIFF'S MOTION TO AMEND PETITION FOR INJUNCTIVE RELIEF

THIS CAUSE came on to be heard upon PLAINTIFF'S MOTION TO AMEND PETITION FOR INJUNCTIVE RELIEF, and the Court, after being fully advised in the premises, it is

ORDERED AND ADJUDGED that the said Motion be and the same is hereby DENIED with prejudice because of pending certiorari proceeding.

DONE AND ORDERED in Chambers this 28th day of June, 1984.

ROBERT E. HENSLEY
CIRCUIT COURT JUDGE

Copies Furnished To:

WALTER G. CAMPBELL, JR., ESQUIRE

A. LAMAR MATTHEWS, JR., ESQUIRE

JAMES McMANUS, ESQUIRE

LINDA HADDAD, ESQUIRE

STATE OF FLORIDA, COUNTY OF SARASOTA
I hereby certify that the foregoing is a true and correct copy of the original filed in this office.
Witness my hand and seal this Jul 2 - 1984R. H. Hackney, Jr., Clerk of the Circuit Court.

By Susie Belzer, Deputy Clerk